Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1346

LEWIS S. TAYLOR, Individually and in his official capacity as Director of Personnel of the City of Philadelphia; HILLEL S. LEVINSON, Individually and in his official capacity as Managing Director of the City of Philadelphia; FRANK L. RIZZO, Individually and in his official capacity as Mayor of the City of Philadelphia, and THE CITY OF PHILADELPHIA, *Petitioners*

v.

LUIS A. RODRIGUEZ, on behalf of himself and all other persons similarly situated, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners, Lewis S. Taylor, Hillel S. Levinson, Frank L. Rizzo and the City of Philadelphia, respect-

fully pray that a Writ of Certiorari issue to review an Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 27, 1977.

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Pennsylvania, dated September 2, 1976, granting injunctive and legal relief to the Respondent and his class are reported at 428 F. Supp. 1118 (E.D. Pa. 1976) and set forth in the Appendix hereto beginning at page A1.

The opinion of the District Court awarding attorneys' fees to Respondent's counsel dated October 5, 1976, is reported at 420 F. Supp. 893 (E.D. Pa. 1976) and is set forth in the Appendix hereto beginning at page A9.

The opinion of the United States Court of Appeals for the Third Circuit, filed December 27, 1977, is not yet reported and is set forth in the Appendix hereto beginning at page A19.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 27, 1977. This Petition for Certiorari was filed within ninety days of that day. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Age Discrimination in Employment Act [ADEA], a plaintiff job applicant who is not ordered hired by the trial court and who is demonstrably unqualified for a position by reason of his post-trial failure of a court ordered pre-employment civil service examination, is nevertheless entitled to back pay and liquidated damages?

2. Whether under the ADEA, a plaintiff job applicant who only establishes that he was wrongfully denied the right to take a non-discriminatory pre-employment civil service examination can shift the burden of proof to the defendant employer to not only justify the denial but to affirmatively demonstrate at trial that the applicant is unqualified under the very examination he demanded to take?

3. Whether Community Legal Services (CLS), as a publicly funded legal services corporation, may recover attorney's fees under the ADEA?

4. Whether the burden of showing compliance with federal regulations which authorize exceptions to the general statutory prohibition in the Legal Services Corporation Act against taking fee generating cases, rests with CLS as the party seeking the exception, or with the defendant?

5. Whether under the ADEA, an award of attorneys' fees to a publicly funded legal services corporation must be based upon salaries paid to similarly experienced attorneys in the private bar and not upon the actual salaries paid to the employee attorneys seeking the award?

STATUTORY PROVISIONS INVOLVED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967:

29 U.S.C. Section 626(b): "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this Title, and subsection (c) of this section. Any act prohibited under section 623 of this Title shall deemed to be a prohibited act under section 215 of this Title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this Chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section . . ."

FAIR LABOR STANDARDS ACT OF 1938:

29 U.S.C. Section 216(b): "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in

writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of an employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or 207 of this title by an employer liable therefor under the provisions of this subsection."

LEGAL SERVICE CORPORATION ACT OF 1974:

42 U.S.C. Section 2996(b)(1): "Funds, limitation. — No funds available by the Corporation under this title, either by grant or contract, may be used — (1) to provide legal assistance with respect to any fee-generating case (except in accordance with guidelines promulgated by the Corporation), to provide legal assistance with respect to any criminal proceeding, or to provide legal assistance in civil actions to persons who have been convicted of a criminal charge where the civil action arises out of alleged acts or failures to act and the action is brought against an officer of the court or against a law enforcement official for the purpose of challenging the validity of the criminal conviction."

TITLE 45, CODE OF FEDERAL REGULATIONS, §1609.3:

"Prohibition. — No recipient shall use funds received from the Corporation to provide legal assistance

in a fee-generating case unless other adequate representation is unavailable. All recipients shall establish procedures for the referral of fee-generating cases."

TITLE 45, CODE OF FEDERAL REGULATIONS, §1609.4:

"Authorized representation in a fee-generating case. — Other adequate representation is deemed to be unavailable when (a) the recipient has determined that free referral is not possible because:

(1) The case has been rejected by the local lawyer referral service, or by two private attorneys; or

(2) Neither the referral service nor any lawyer will consider the case without payment of a consultation fee; or

(3) The case is of the type that private attorneys in the area ordinarily do not accept, or do not accept without prepayment of a fee; or

(4) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time; or

(b) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other non-pecuniary relief; or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims; or

(c) A court appoints a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

STATEMENT OF THE CASE

Respondent, Luis Rodriguez, then age 46, applied on December 23, 1974, to the Petitioner, City of Philadelphia, to take the competitive Civil Service examination for the position of Security Officer I. One month later, the City's Personnel Department informed Mr. Rodriguez that he could not sit for the examination because he was overage. Since 1966, the City of Philadelphia had adhered to a personnel policy requiring that applicants for the position of Security Officer I be less than 41 years of age in order to be eligible to take the requisite competitive Civil Service examination. Impelled by his rejection, Mr. Rodriguez brought suit on behalf of himself and all other persons over the age of 41 against Petitioners in the United States District Court for the Eastern District of Pennsylvania. The Respondent's complaint, *inter alia,* alleged that the City's maximum age requirement for Security Officer I applicants violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634. The complaint sought class relief in nature of a permanent injunction proscribing enforcement of the City's age limit and individual relief for Mr. Rodriguez in the form of an opportunity to take the competitive examination and an entitlement to recovery of pecuniary losses.

On December 27, 1976, the District Court certified the class pursuant to Rule 23(b)(2) and, after a non-jury trial, concluded that the City's policy of barring persons over the age of 41 from taking the competitive examination for the job of Security Officer I violated §4(a)(1) of the ADEA, 29 U.S.C. §623(a)(1), and was not a bona fide occupational qualification under 29 U.S.C. §623(f)(1). The Court did not find that any class members, including the Respondent, were otherwise qualified for the position and did not order any hirings. It did, however, grant the named Respondent an opportunity to take the same written examination he had been denied in 1975 on account of his age. He was to be

offered the position of Security Guard I with full retroactive benefits if, and only if, he passed the examination. Notwithstanding this contingent entitlement to the position, the Court went on to award the Respondent unpaid wages or back pay under 29 U.S.C. §626(b) for the period from the date of the first hiring after his rejection and the date of the final order. The District Court further ruled that because the City's violation was willful, the Respondent was entitled to liquidated damages in the amount of the calculated unpaid minimum wages under 29 U.S.C. §626(b). The District Court specifically held that the respondent "having proved the violation, is not required to prove that 'but for' the violation he would have been hired in order to be entitled to an award of money both as an 'amount owing' to him and as liquidated damages." (A6).

In a subsequent opinion on October 5, 1976, the District Court awarded attorneys' fees to Respondent's counsel, Community Legal Services, a federally funded legal services corporation. Adopting a rate of $30.00 per hour, the Court rejected the requested hourly rates of $80.00 "in court" and $50.00 "out of court" on the basis that they were excessive in view of (a) the experience of the attorneys; (b) their annual salaries; and (c) comparable attorney's compensation. The Court concluded that $30.00 an hour was more than reasonable considering that the actual compensation of the two petitioning CLS attorneys was only approximately $9.00 and $6.75 an hour respectively, and that comparable "public interest" attorneys received relatively modest rates like the $30.00 per hour compensation for criminal appointment under the Criminal Justice Act of 1974.

Petitioners appealed to the United States Court of Appeals for the Third Circuit from that portion of the September 2, 1976 order awarding damages to the named respondent and from the order of October 5, 1976, granting attorneys' fees. Respondent cross-

appealed from the attorneys' fee order, challenging the sufficiency of the hourly rate granted. The various appeals were subsequently consolidated for briefing and argument puposes.

At oral argument before the Court of Appeals, it was revealed that pursuant to the District Court's order, Mr. Rodriguez had been given the written examination for the job of Security Officer I, but that he had received a failing score. The Respondent was accordingly unqualified and would never have been hired during the period in question.

On December 27, 1977, the Court of Appeals rendered its judgment in this matter, affirming the back pay and liquidated damages awarded to the named Respondent. The Court specifically recognized that the Respondent's failure on the Civil Service exam meant that the District Court's order would enable him to collect back pay for a job for which he was unqualified. Nevertheless, the Court found a prima facie entitlement to back pay arose without regard to Respondent's entitlement to employment. The Court concluded that once discrimination is found under the ADEA, it is the defendant's burden to prove that the plaintiff is not qualified for the position, even where the plaintiff 's only demonstrated injury was the denial of a right to compete in an objective written examination. The Court concluded that the fact that the named Respondent subsequently failed the competitive examination and was thereby demonstrably unqualified was unimportant, since it came after the close of the evidence at trial.

As to the order of October 5, 1976, the Court affirmed in principle the District Court's award of attorneys' fees to CLS under the ADEA. The Court held that the statutory prohibition in the Legal Services Corporation Act of 1974 against providing legal assistance in fee-generating cases did not bar attorneys' fee awards in such cases in the absence of proof that CLS had

failed to comply with federal regulations allowing exceptions to the general prohibition. Rather than requiring CLS to prove that the facts of the particular case justified an exception under the regulations, the Court instead presumed such facts and imposed the burden on the Petitioners to show that CLS had acted improperly.

In addition, the Court held that the absolute prohibition in the local CLS articles of incorporation against the handling of fee generating cases under any circumstances was satisfied by CLS's presumed compliance with the federal regulations. Finally, the Court held that the appropriate referents in awarding attorneys' fees to the CLS attorneys were not the actual salaries paid to them by their *public* employer but the salaries prevailing in the *private* legal market for similarly experienced attorneys in similar cases.

The case was remanded to the District Court for re-calculation of the Respondent's monetary award to account for necessary set-offs and the recalculation of the attorneys' fee award. This petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises an Important Federal Question as to Whether Back Pay and Liquidated Damages Are Allowable Under the ADEA Without a Finding of Actual Injury to the Plaintiff or Entitlement to the Disputed Position.

Despite recent dicta in *Lorillard v. Ponns*, —— U.S. ——, 46 U.S. L.W. 4150 (1978), this Court has never directly considered the question of whether under the ADEA a plaintiff job applicant who is not ordered hired by the trial court and who is demonstrably unqualified for a position by reason of his post-trial failure of a court ordered civil service examination, is nevertheless entitled to back pay and liquidated damages. In the instant case, the Respondent was wrongfully denied only the right to compete for the position of Security Guard. That injury was properly compensated by the opportunity to compete and not by back pay and liquidated damages.

From its inception, this Court had consistently held that a plaintiff's injury dictates his remedy:

> The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be in the situation he would have occupied if the wrong had not been committed. *Wicker v. Hoppock*, 6 Wall 94, 99; 18 L.Ed. 752 (1867).

In discrimination law, this time honored principle has heretofore been strictly followed. In fashioning back pay remedies under Title VII, this Court has recognized the intent of Congress to compensate discriminatees rather than to punish offenders. Congress

intended for Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). With respect to discriminatory refusals to hire, this Court has routinely applied these principles to award back pay only to those individuals who are qualified for the positions in question and who would have been hired "but for" the discrimination. *Id.*

In the instant case, the District Court awarded back pay to the Respondent, but specifically held that having proved a violation, he was not required to prove that "but for" the violation he would have been hired in order to be entitled to the award (A9). Back pay was given with no showing of entitlement to the position. The Court reserved the question of entitlement until after the Respondent had taken the written examination, ordering him hired, if and only if, he passed the test. The Respondent did not pass the exam and was not ordered hired.

Since the District Court correctly concluded that the Respondent was not entitled to the position of Security Guard but only the opportunity to compete for it, the Respondent suffered no demonstrable economic loss as a result of the discrimination. He nevertheless was awarded back pay under the Act. Such an award was not compensation, but a windfall to the Respondent, and tantamount to punitive damages against the Petitioners.[1] Such a result could not have been envisioned by Congress. As Senator Yarborough in the Senate Report on the Act stated:

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1. The Third Circuit has concluded that punitive damages under the ADEA are limited to the liquidated damage provision under 29 U.S.C. §626(b). *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977).

> We now have the enforcement plan which I think is best adopted to carry out the age discrimination in employment ban with the least anxiety or difficulty on the part of American business and with complete fairness to the workers. 113 Cong. Rec. 31254 (1967).

"The least anxiety or difficulty on part of American business" would not be obtained by the imposition of penalties totally disproportionate to the wrong committed.

A majority of lower courts have held that back pay under the ADEA is contingent upon a demonstrated entitlement under the traditional "but for" test. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Brennan v. Ace Hardware*, 495 F.2d 368 (8th Cir. 1974); *Bishop v. Jelleff Associates*, 398 F. Supp. 579 (D.D.C. 1974); *Schultz v. Hickok Manufacturing Corp.*, 358 F. Supp. 1208 (N.D. Ga. 1973); *Monroe v. Penn Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971).

The Court of Appeals recognized the "but for" principle but paid it only passing lip service. In spite of the Respondent's lack of entitlement to the position, the Court justified the back pay award on the basis of the "emotional costs of the [Respondent's] uncertainty" in finding out whether he would be hired. (A33). All plaintiffs face such uncertainty. However, a plaintiff who doesn't prove his entitlement has merely shown that he was justified in that uncertainty. Compensation in such an instance serves no public purpose. As a general rule an injured party, except where punitive damages may be awarded, may recover damages for only the *actual* loss he suffers. He is to be made whole, but is not to be put in a better condition that if he would have been if the wrong had not been committed. *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963). The

Respondent here suffered no actual wage loss because he was not qualified for the position.

By concluding that the award of back pay was appropriate here, the Court of Appeals abdicated its responsibility to produce a just result in light of the circumstances peculiar to this case. The Court should accept jurisdiction of this case to resolve these serious questions regarding the construction of the ADEA.

II. The Decision Below Raises a Significant Federal Question as to the Proper Allocation of the Burdens of Proof in Damage Proceedings Under the ADEA.

The Court of Appeals justified the decision of the District Court by holding that, regardless of the Respondent's present qualification as evidenced by his post-trial failure of the civil service examination, the Respondent was presumptively entitled to back pay because the City failed to prove at trial that he was unqualified. The Court held that in an ADEA case an applicant who proves a violation bears the initial burden of demonstrating entitlement to damages. If the applicant established the existence of vacancies and his general qualifications for work of the type sought, the burden shifts to the employer to prove that the applicant would not have been hired, regardless of the age discrimination, because he lacked the necessary qualifications for the position.

Despite the fact that the Respondent failed the written examination, the Court of Appeals held that the City had not met its burden because the failure occurred after trial. The Court concluded that the Petitioners could have given the test to the Respondent prior to trial and introduced his failure at that time. The conclusion ignored the obvious fact that the only issue in the case was whether the Respondent had the right to enter the selection process and take the exam

in the first place. To require Petitioners to administer the exam and other pre-employment screening devices including physical, psychiatric and background exams to a plaintiff whose claim is pending, is to give him the relief he seeks without trial.[2] In any event, the District Court obviously did not close the inquiry in regard to the Respondent's qualifications at the end of the trial. The Court specifically left open the Respondent's performance on the exam and his subsequent entitlement to the position. The appropriate time for the Petitioners to introduce evidence of non-qualification was when it became available, subsequent to the examination. This is a burden which the Petitioners stand ready to meet, but have been denied by the Court of Appeals.

The Court of Appeals acknowledged that the Respondent had failed the exam and that he would be receiving back pay for a job to which he was not entitled (A24). It nevertheless affirmed. The necessity of reversing this holding and fairly distributing the burdens of proof under the ADEA is an important reason for this Court to grant certiorari.

III. The Decision Below Raises an Important but Previously Unanswered Federal Question as to Whether CLS May Be Awarded Attorneys' Fees Under the ADEA.

The Court of Appeals upheld the District Court's award of fees on the basis that they could see nothing in the ADEA which suggested that legal service organizations were to be treated any different from regu-

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2. Carried to its logical conclusion, the Court's holding will require an employer, at great expense, to process fully every applicant who would otherwise be properly eliminated from the competition because he might bring a claim in the future. Moreover, to blithely suggest that written examinations can be given at any time is also to ignore the important requirement of exam security.

lar attorneys with respect to their entitlement to fees. This simplistic approach ignored the congressional purposes underlying the availability of attorneys fees under the ADEA and the availability of counsel under the Legal Services Corporation Act. Both Acts were designed to ensure that deserving plaintiffs would be able to secure their day in court regardless of their income or the financial prospects of their claim. With respect to the attorneys' fees guarantees under the ADEA, and the recent Civil Rights Attorneys' Fees Awards Act of 1976, it is apparent that Congress was only concerned with aiding those plaintiffs whose access to courts depended upon their ability to hire *private* counsel. Nothing in the legislative history suggests that the provisions were intended to assist civil rights plaintiffs who, by access to free legal services at taxpayer expense, bear no attorneys' fees. Indeed, the availability of such services to qualified plaintiffs through legal services corporations, removes the exact same barriers to the courts which the attorneys' fees award provisions are designed to eliminate.

The House Report on the Civil Rights Attorneys' Fees Awards Act of 1976 stated:

> The application of the standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of this [Act] will be to promote the enforcement of the Federal Civil Rights Acts as Congress intended and to achieve uniformity in those statutes and justice for all citizens. House Report (Judiciary Committee) No. 94-1558 Sept. 15, 1976 at p. 9.

Obviously, attorneys' fees guarantees were not designed to encourage those attorneys who needed no encouragement. Attorneys employed by CLS are paid with public funds and are mandated to provide repre-

sentation in just such cases where the prospect of a fee recovery is so remote that private counsel will not take the case. Attorneys' fees awards provisions and the Legal Services Corporation Act are compatible remedies to the same problem. CLS was established to guarantee qualified plaintiffs their day in court by providing free representation by *public* attorneys, while the attorneys' fees awards approaches the problem from the opposite direction by encouraging participation of the profit oriented *private* bar. To award attorneys' fees to CLS, whose very purpose is to prosecute such cases, furthers no apparent legislative purpose. What it does do is to grant CLS a windfall and a double dip at public funds.

Finally, attorneys' fee awards are generally intended only to compensate plaintiffs for their expenses, and not to punish errant defendants. To award fees here to an organization already compensated through public funding is to transform the award into a punitive measure against the defendant. Shifting the fee does not further any legitimate interest of the individual plaintiff who owes nothing anyway; nor any legitimate interest of CLS itself, which is already funded to provided representation. However, it does clearly punish the defendant for no discernable public purpose.

Legality of attorneys' fees award to CLS and similar publicly funded legal aid organizations is an important federal question which should be answered by this Court.

IV. The Decision Below Raises Important Federal Questions as to Scope of the Authority of Community Legal Services to Take Fee Generating Cases Under Federal and State Law.

Petitioners contend that the legality of CLS's initial representation of a plaintiff is a threshold question in

any determination of the propriety of an award of attorney's fee for such representation. Under the Legal Services Corporation Act, 42 U.S.C. §2996(b)(1), Respondent's counsel, CLS, is prohibited from using corporation funds to provide legal assistance with respect to any fee generating cases, except in certain limited situations where the private bar has refused to take such cases. 45 CFR 1609. Under the ADEA enforcement provisions, attorneys' fees are guaranteed to successful counsel. 29 U.S.C. §626(b) and §216(b). Given the mandatory language employed, every case brought under the ADEA is automatically transformed into a contingent fee case which CLS must accordingly decline, unless it has first been rejected by private counsel. Although the Court of Appeals recognized this prohibition in principle, it *presumed,* absent contrary evidence, that CLS was entitled to an exception from the general prohibition. It placed the burden of proof on the City, the party to whom such evidence was the least available, to demonstrate that CLS had *not* complied with the federal regulations. Petitioners contend that the burden rightfully belonged on CLS to make *a prima facie* showing that it had only accepted this case as a matter of last resort. Any other allocation of the burden is inequitable and contrary to the clear intention of Congress. This Court should correct this error.

The Court of Appeals also rejected the Petitioners' argument that this local CLS was prohibited from receiving attorneys' fees on the basis that its particular articles of incorporation prohibited it from handling any fee-generating cases. These self-imposed articles are more restrictive than the Legal Services Corporation Act with respect to the propriety of CLS accepting fee-generating cases. Article IX of its articles of incorporation provides:

> These standards require that persons who, by reasons of poverty, are financially unable to secure counsel will *not* be provided legal services in matters of a contingent nature, including, but not limited to, personal injury cases and any other type cases normally handled on a contingent basis by attorneys, and any other cases as may yield a recovery sufficient to interest a private attorney in accepting such a case.

Under Pennsylvania law, the articles of a corporation must be strictly construed and any authority not expressly granted is prohibited. *In Re Southwestern State Normal School,* 213 Pa. 244 (1906); *Appeal of Steward,* 56 Pa. 413 (1868). Moreover, if two constructions of a charter are possible, the one that limits corporate power must be chosen. *Dugan v. Monongahela Bridge Co.,* 27 Pa. 303 (1856).

The Court of Appeals ignored the clear language of CLS's corporate article and held that the prohibition therein regarding fee-generating cases could be waived if CLS otherwise complied with the related federal regulations. The Court was clearly in error. Pennsylvania law requires and federal law allows a strict enforcement of the self imposed local restrictions, regardless of what the more liberal federal regulations might permit. The Court of Appeal's decision is in direct conflict with the law of Pennsylvania and this Court should accordingly grant certiorari to resolve this error.

V. The Decision Below Raises a Significant Federal Question as to Whether Under the ADEA, an Award of Attorneys' Fees to a Publicly Funded Legal Services Corporation Must Be Based Upon Salaries Paid to Similarly Experienced Attorneys in the Private Bar and Not Upon the Actual Salaries Paid to the Employee Attorneys Seeking the Award.

This Court has not heretofore considered the question of whether legal service organizations must be

awarded statutory attorneys' fees at rates which are tied to the income of the private bar and which bear no relation to their actual salaries. The District Court awarded fees to the Respondent's attorneys at the rate of $30.00 an hour because of its understanding of their limited experience, their annual salaries at CLS, and comparable attorneys' compensation. The Court of Appeals rejected this determination on the theory that the appropriate referent in cases of this nature was not the actual salaries earned by the petitioning attorneys during the representation, but the salaries paid to attorneys of similar skills within the *private* bar. This decision to base fees on the earnings of attorneys who had nothing to do with the litigation at hand was in error and must be reversed by this Court.

In considering the question of an appropriate fee, the Court of Appeals observed that legal service salaries are generally lower than salaries paid associates in private firms with comparable experience and credentials. The Court correctly noted that "Courts in awarding fees are not empowered to rectify this general disparity." (A47). However, in spite of this self-admonition, the Court proceeded to do just what it said it had no power to do. It held that the legal service attorneys and private attorneys should be compensated at the same rates, regardless of actual salary differences.

The holding by the Court of Appeals does not further the purposes of statutory attorneys' fees. The prospect of awards of attorneys' fees is intended to act as an incentive to private attorneys to offer their services in legitimate discrimination cases. However, the amount of an award need only be sufficient to adequately compensate the particular attorneys involved and to attract competent counsel to such cases in the future. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Baxter v. Savannah Sugar Refining Corporation*, 495 F.2d 437 (5th Cir. 1974).

Unlike a private law firm, CLS is not organized for the purpose of generating profits, but rather to serve those who could otherwise not afford legal aid. CLS is obligated to provide representation regardless of the prospect of payment and does not need the incentive of a fee award to comply with its statutory mandate. The award by the District Court actually went far beyond the regular hourly salary rates of the petitioning attorneys, but was still held inadequate by the Court of Appeals as below the market place rate. A rate which bears no relation whatsoever to the actual salaries commanded by the petitioning attorneys is a legal fiction and results in a windfall to the attorneys rather than reasonable compensation.

A number of courts have awarded fees to private attorneys at reduced rates because of the *pro bono publico* aspect of the litigation. *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *National Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Adams v. Hempstead Heath Co.*, 426 F. Supp. 1141 (D.C. N.Y. 1974). The Court of Appeals in *Souza* was explicit:

> We disagree with the assumption of the District Court and with parties that the hourly rate is to be based on a reasonable market place rate for such services. This is not a case in which attorneys sold their services to a private client willing to pay the market price for them. 512 F.2d at 1141.

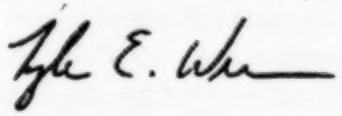
The reasons for awarding a lower rate to a legal service attorney who is compensated regardless of the outcome of his suit are even more compelling.

The question of the proper standards to be applied in determining hourly rates for legal services organizations is an important federal question and one for which this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, your petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

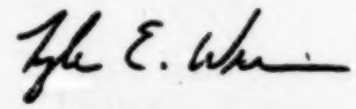
Respectfully submitted:



TYLER E. WREN
Assistant City Solicitor
JAMES M. PENNY, JR.
Deputy City Solicitor
SHELDON L. ALBERT
City Solicitor
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 1978 three copies of the Petition for Writ of Certiorari were served by First Class Mail on Andrew Erba, Esquire, 5219 Chestnut Street, Philadelphia, Pennsylvania 19107, Counsel for the Respondent. I further certify that all parties required to be served have been served.



TYLER E. WREN
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Counsel for Petitioners

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Philadelphia, Pa. 19107

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

Class Action

No. 75-1738

LUIS A. RODRIGUEZ, *Plaintiff*

v.

LEWIS S. TAYLOR, HILLEL S. LEVINSON, FRANK L. RIZZO

and

THE CITY OF PHILADELPHIA

VAN ARTSDALEN, J. September 2, 1976

I.

Findings of Fact

1. Luis A. Rodriguez on December 23, 1974, filed an application for employment with the City of Philadelphia for the position of Security Officer I. The application was rejected and Luis A. Rodriguez was not permitted to take the competitive examination that was conducted by the City of Philadelphia for such position solely because Luis A. Rodriguez was "over maximum age" for being hired.

2. The City of Philadelphia from 1966 and continuously thereafter has maintained an inflexible requirement and policy that applicants for the position of Security Officer I must be less than 41 years of age, in order to be permitted to take the competitive examination for the position, and to be originally hired by the City of Philadelphia as a Security Officer I. This age

restriction was promulgated by the City Personnel Office of the City of Philadelphia in conjunction with City Departments and was approved by the City's Civil Service Commission.

3. The City of Philadelphia does not require an applicant for the position of Security Officer I to present or obtain any medical certification prior to or as a requisite for filing an application for such employment, or for qualifying to take the competitive examination.

4. The City of Philadelphia employs approximately 48 security officers; the median age is approximately 39 years, and approximately 15 are over the age of 41 years. Those who have been hired as Security Officer I are not discharged, nor are they required to retire, resign, or accept other job assignments or classifications after becoming 41 years of age. Of those security officers presently employed by the City of Philadelphia who are over 41 years old, the duties and work to which they are assigned are being satisfactorily performed by them and are the same or not significantly different from the duties assigned to those security officers who are under 41 years of age.

5. All of the work and duties of a Security Officer I, based on the job qualifications and description published by the City of Philadelphia (Exhibit R 11) and from actual past experience, can be safely and satisfactorily performed by a person over the age of 41 years who is in good physical health and of normal physical strength.

6. Inexpensive tests can be devised which can accurately determine whether a particular individual over the age of 41 years will be able from a physical and mental standpoint to perform satisfactorily all of the duties and tasks which may be assigned to a Security Officer I.

7. The City of Philadelphia has made no job task analysis and has undertaken no studies to determine the extent and frequency of physical and mental effort

and stress required or anticipated in the performance of the duties of a Security Officer I. The City of Philadelphia has made no objective analysis, and has relied upon no statistical or scientific studies to establish its contention that the 41 year maximum age requirement for being initially hired as a Security Officer I is a bona fide occupational qualification, reasonably necessary to the normal operation of the city government.

8. The duties of Security Officer I primarily involve policing the facilities of the Philadelphia General Hospital and the Water Department.

9. Luis A. Rodriguez was born on December 12, 1928 (Exhibit P-8). Both at the time of the filing of the application and the time of the trial he was strong physically and in good health. He has had extensive experience in security guard work and duties, and is presently so employed, part-time at the rectory of St. Peter's Roman Catholic Church, 5th and Girard Avenue, Philadelphia, Pennsylvania. He has taken and completed the training course conducted at the Philadelphia Police Academy in connection with qualifying for and obtaining a Private Patrolman's license pursuant to the laws of the Commonwealth of Pennsylvania. The said training course is likewise required of Security Officers I. He is also presently an active enlisted soldier in the Pennsylvania National Guard and participates in the regularly scheduled training exercises and summer camp training. He does, however, receive a non-service connected Veterans Administration disability pension for a back condition, but this does not interfere with his ability to perform heavy physical labor. He regularly engages in personal physical exercises such as weight lifting and calisthenics. The present state of his physical strength and capacity for hard physical labor (based on both testimony and personal observation in court) exceeds that of many healthy men who are under 40 years of age.

10. Although on a statistical average persons who

are 40 years of age or over are not as physically strong nor as physically quick in movement and reaction time as persons who are under 40 years of age, there are many persons over 40 years of age who are physically stronger and quicker than many persons under 40 years of age. Most persons, as individuals, reach their maximum physical strength and capabilities at approximately age 25 and thereafter gradually decline. However, the rapidity of decline varies among individuals, as does the maximum physical strength and capabilities, and with proper exercise and practice it is possible for an individual to have strength and physical alertness over the age of 40 superior to that which the individual had at the normal age of maximum capability.

11. Hiring and/or retaining persons over the age of 41 years as Security Officers I by the City of Philadelphia will in no way endanger such employees, the efficiency of the city government operation, or the public safety, provided proper physical, medical and mental objective standards based on factors other than age are applied. Such standards, based on factors other than age, would provide a greater degree of safety and efficiency than would any standard based solely on age.

12. The United State Government has no requirement that would preclude hiring and employment by the United States in job classifications having duties similar to that of Security Officer I of persons between the ages of 40 and 65.

13. The City of Philadelphia's maximum age requirement of 41 years for initial hiring and employment on a Security Officer I is not a bona fide occupational qualification, and it is not reasonably necessary to the normal operation of the city government or any of its departments or agencies.

14. Luis A. Rodriguez has complied with all statutory and administrative requirements prerequisite to filing and maintaining this action.

15. The last examination for Security Officer I was conducted by the City of Philadelphia on or about February 27, 1975, and the first person hired as a Security Officer I by the City of Philadelphia subsequent to the rejection of the application of Luis A. Rodriguez was June 2, 1975. Additional persons have been employed as Security Officer I subsequent to June 2, 1975.

16. The salary of a Security Officer I commences at $11,275.00, and the maximum for such position is $12,303.00.

II.

Conclusions of Law

1. The court has jurisdiction of the subject-matter and the parties, and venue is proper in the Eastern District of Pennsylvania.

2. The City of Philadelphia, by its policy of rejecting applications, refusing to permit applicants to take the competitive examinations, and refusing to hire any person over the age of 41 years as a Security Officer I violates section 4(a)(1) of the "Age Discrimination in Employment Act," Act of December 15, 1967, Pub. L. 90-202, 81 Stat. 603, 29 U.S.C. §623(a)(1).

3. The requirement that an applicant for the position of Security Officer I be under the age of 41 years is not a bona fide occupational qualification reasonably necessary to the normal operation of the city government.

4. The City of Philadelphia refused to hire and otherwise discriminated against Luis A. Rodriguez individually and the plaintiff class in respect to employment as a Security Officer I because of the age of Luis A. Rodriguez individually and the age of all members of the plaintiff class in violation of section 4(a)(1) of the "Age Discrimination in Employment Act," Act of December 15, 1967, Pub. L. 90-202, 81 Stat. 603, 29 U.S.C. §623(a)(1).

5. The plaintiff class and Luis A. Rodriguez individually are entitled to injunctive relief.

6. Luis A. Rodriguez is entitled to an award in accordance with section 7(b) of the "Age Discrimination in Employment Act," Act of December 15, 1967, Pub. L. 90-202, 81 Stat. 603, 29 U.S.C. §626(b). The amount owing as a result of the violation is deemed to be the unpaid minimum wage of $11,275 per annum calculated from June 2, 1975 (the date the first person was hired for the job subsequent to rejection of the application of Luis A. Rodriguez), to August 12, 1976 (the date of the entry of the award by oral order of the court).

7. The violation of the Act by the City of Philadelphia was willful.

8. Luis A. Rodriguez is entitled to liquidated damages in an amount equal to the award of the unpaid minimum wage.

9. Luis A. Rodriguez, having proved the violation, is not required to prove that "but for" the violation he would have been hired in order to be entitled to an award of money both as an "amount owing" to him and as liquidated damages.

AND NOW, this 2nd day of September, 1976, in accordance with findings of fact, conclusions of law, decision and order of the court entered orally in open court on August 12, 1976 at the conclusion of the trial on the merits, and as supplemented by written findings of fact and conclusions of law to be filed herewith, it is ORDERED and DECREED as follows:

1. The refusal of the City of Philadelphia to hire anyone as Security Officer I who is 41 years of age or older, and to reject all applications for such position by such persons on account of the age of such applicants, and to prohibit such applicants from taking the competitive examination for such positions because of the age of such persons, violates the express provisions of 29 U.S.C. §623(a)(1), being section 4(a)(1) of the Act of December 15, 1967, Pub. L. 90-202, 81 Stat. 603, commonly called the "Age Discrimination in Employment Act."

2. The City of Philadelphia and the individual defendants jointly and severally and in their official capacities are permanently restrained and enjoined from henceforth rejecting any application and/or prohibiting any applicant from taking the required competitive examination for the position of Security Officer I with the City of Philadelphia because of the age of any such applicant who is at least 40 years old and less than 65 years old. This shall not prevent establishment of bona fide job related physical and mental qualifications and tests based on standards other than age, nor prevent age qualifications wherein the minimum age is less than 40 years and the maximum age is 65 years or older.

3. Prior to the City of Philadelphia hiring any additional person or persons as Security Officer I (excepting only the named plaintiff, Luis A. Rodriguez, as hereinafter set forth), the City of Philadelphia shall:

(a) receive, during a reasonable period of time, applications for the position of Security Officer I;

(b) conduct a new competitive examination, containing no age qualification inconsistent with this order; and

(c) give adequate and proper public notice, including utilization of the local public news media that applications will be received and a competitive examination held, and that no person, who is at least 40 years of age and less than 65 years shall be disqualified or scored at a competitive disadvantage because of age.

4. Luis A. Rodriguez shall be afforded the opportunity to take the examination for Security Officer I that was held in February, 1975, within 90 days from this date, the examination to be scored

and the test or tests administered the same as if he had been permitted to take the examination when it was held in February, 1975, provided no score or qualification solely because of age shall be calculated. Should he take the examination and receive a score such that under the City of Philadelphia procedures he would have been hired, except for his age as a Security Officer I at sometime between February, 1975 and August 12, 1976 in preference to some other p rson who was so hired, he shall be forthwith hired as a Security Officer I, with seniority and promotion rights, pension, retirement and similar employee benefits retroactive to the date he would have been hired, and with salary retroactive to August 12, 1976.

5. Luis A. Rodriguez is awarded, in accordance with section 7 of the Age Discrimination in Employment Act, 29 U.S.C. §626(b) as the amount owing to him as a result of the violation of said Act by the City of Philadelphia, the sum of $13,768.70 (calculated on an annual minimum salary of $11,275 from June 2, 1975 to August 12, 1976—63½ weeks at $216.83 per week), plus an equal sum of $13,768.70 as liquidated damages for the willful violation of the Act. Judgment shall forthwith be entered in FAVOR of Luis A. Rodriguez and AGAINST the City of Philadelphia in the sum of Twenty-seven Thousand, Five Hundred Thirty-seven Dollars and Forty Cents ($27,537.40).

6. Defendants shall pay the costs of this proceeding and counsel fees to plaintiff 's counsel.

7. Jurisdiction of this action and over the parties shall be retained for the purposes of enforcing this order and to enter such further and additional orders as may be appropriate.

BY THE COURT:

DONALD W. VANARTSDALEN

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
Class Action
No. 75-1738

LUIS A. RODRIGUEZ, *Plaintiff*

v.

LEWIS S. TAYLOR, HILLEL S. LEVINSON, FRANK L. RIZZO
and
THE CITY OF PHILADELPHIA

VAN ARTSDALEN, J. October 5, 1976

Judgment has been entered for injunctive relief for the class, and injunctive relief and monetary damages awarded to the class representative plaintiff in his individual capacity. Plaintiff 's counsel has filed motion for the award of counsel fees.

This action was brought against the City of Philadelphia for its violation of the Federal Age Discrimination in Employment Act, 29 U.S.C. §§621-634, by reason of an imposition by the City of a 41 years-of-age limitation on accepting applications for the position of Security Officer I. The Act expressly provides for an award of reasonable attorney's fees to a successful plaintiff, adopting by reference in 29 U.S.C. §626(b) the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §216(b). Thus, under *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), attorney's fees may be properly awarded.

Plaintiff has submitted two affidavits in support of the motion for counsel fees. Defendants do not dispute the factual allegations of the affidavits. The affidavits appear to set forth the relevant information that must be taken into account in awarding counsel fees, under the guidelines of *Lindy Bros. Bldrs., Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). The affidavits itemize the dates, hours, nature of work and services, and identification of personnel that performed attorney services on behalf of plaintiffs. Mr. Erba and his lawyer assistant, Sheryl Dicker, and a law student, Ricardo Cuevas, all of whom performed legal services for plaintiff in this litigation, are employees of Community Legal Services, Inc. (CLS), a publicly funded agency that provides civil legal services for certain qualified indigent persons. One of the affidavits sets forth Mr. Erba's annual salary of $17,800.00 and Sheryl Dicker's of $13,500.00. Ricardo Cuevas receives $150 per week of which $10 per week is paid by CLS and $140 is paid

by the University of Pennsylvania under a "work-study" program.

Although plaintiff's counsel suggests in the brief that *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974), and *Hodgson v. First National Savings and Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972), indicate the propriety of an award of attorney's fees to the Department of Labor, I do not so interpret those cases, which merely make passing reference to the statutory language providing for attorney's fees. Neither counsel has cited any case directly on point as to whether CLS is entitled to receive attorney's fees. I conclude that an award of such fees to CLS is appropriate.

The Act utilizes mandatory language. 29 U.S.C. §216(b) states: "The court . . . shall . . . allow a reasonable attorney's fee. . . ." Thus the court would appear to have no discretion to deny counsel fees. *See Wright v. Carrigg*, 275 F. 2d 448 (4th Cir. 1960). Likewise, it is of no moment that the plaintiff himself may not owe or otherwise be obligated to pay counsel an attorney's fee, because the statute provides the attorney with a direct interest. In *Maddrix v. Dize*, 153 F.2d 274, 276 (4th Cir. 1946), the court stated:

> There is no merit in the suggestion that the present appeal must fall because the right to the fee does not belong to the attorney but to the client who in this case did not join in the petition for the additional allowance. The Act endows the attorney with a direct interest in the fee. . . .

There is no logical reason to lessen defendant's burden simply because an indigent plaintiff obtains representation by an entity such as CLS. The extent of defendant's liability should not depend upon the ability of plaintiff to hire private counsel. Because CLS is publicly financed, reimbursement to it for the time and

effort its attorneys and staff expended in vindicating the rights of plaintiff individually and the plaintiff class is all the more compelling. By awarding reasonable fees to CLS, its limited resources will be increased to expand its present services, or conversely, the same services may be rendered with less expenditure of public funds. In either event the public benefits. and at no greater expense to defendants than if plaintiffs had privately retained an attorney.

This is not to suggest that CLS should engage in litigation that by statute or otherwise is normally fee generating. That is a delicate matter, not presently before me, for resolution between the private sector of the bar and CLS. The record in no way suggests that CLS failed to follow its routine procedures in attempting to encourage private representation for plaintiff and the plaintiff class. Private attorneys apparently lacked interest. This alone evidences that plaintiff's counsel undertook difficult litigation.

Because any award of attorney's fees will go to CLS, the amount to be awarded is more complicated than if an award was to be made to a privately-retained attorney. Should the award be strictly one of reimbursement for the salaries paid to the attorneys, or should fees be awarded on the same basis as if the attorneys were in private practice? Without any case law for guidance, I see no reason for applying a different standard in awarding attorney's fees to a quasi-public legal services program such as CLS.

The *Lindy Bros.* case, *supra*, set forth the guidelines for a district court in determining allowable attorney's fees. Those guidelines are:

1. Computation of hours spent by the attorneys; how many, in what manner, and by whom.

2. Valuation of services rendered, including in class actions an attempt to identify, if feasible, the hours spent as those benefitting the individual client, the unrepresented claimants, or both.

3. Fixing a reasonable hourly rate for time spent, both as to personnel utilized and their activities.

4. Consideration of the contingent nature of success, *i.e.*, whether there should be an increased allowance to reflect the risk taken that there would be no recovery.

5. Evaluating the services rendered in terms of their quality.

These matters insofar as applicable will be separately considered.

1. Hours spent.

The affidavits set forth that Mr. Erba spent 77 hours "office time" and 12 hours "court time." Although a different rate of hourly charge is often made for "in court" as opposed to "office time." I find no practical reason to differentiate in this case. Possibly, to some attorneys, "in court" time requires more undivided concentration. To others, "in court" time in actual trial may be less tedious and no more difficult than "office time." Although a skilled trial attorney might well feel entitled to charge a greater hourly rate for "in court" time, I suspect the difference arises more from a vague subconscious comparison with the British division of legal services between barristers and solicitors. Another reason for charging more for trial time may be a genuine apprehension with which many extremely capable lawyers face a court trial.

2. Valuation of services rendered.

The individual plaintiff was awarded $27,537.40 plus, by way of equitable relief, the possibility of being employed in the future as a Security Officer I. The plaintiff class will now be able to compete on an equal

basis with younger applicants for the position of Security Officer I. Whether any of the plaintiff class will in the future ever be employed is speculative, but assuring the class members of their right to apply on an equal footing is of concrete value to them, even though such assurance cannot be monetarily valued.

3. A reasonable hourly rate or rates.

This, multiplied by the hours of work, appears to be the "lodestar" of any fee determination. In many cases this determination may easily be made, but where, as here, the attorneys are employees of a quasi-public agency, a reasonable hourly rate is difficult to compute unless calculated on the sole basis of their salaries. Mr. Erba's annual salary is $17,800.00. Sheryl Dicker is paid $13,500 per year. The law student receives $150 per week of which CLS pays $10 and $140 is paid by the University of Pennsylvania under a work-study program. Mr. Erba has four years' experience with CLS; Sheryl Dicker has one year's experience.

The petition requests an hourly "in-court" rate for Mr. Erba of $80 and "out-of-court" rate of $50.00; a rate of $30 per hour for Sheryl Dicker, and $15 per hour for the law student.[1] These amounts appear to be excessive considering (a) the experience of the attorneys, (b) their annual salaries, and (c) comparable attorney's compensation.

By way of analogy, Congress has provided a pay scale for attorneys appointed under the Criminal Justice Act to represent indigent defendants in criminal cases and certain other similar proceedings. 18 U.S.C.

1. Simple arithmetic shows that if one works a normal 40 hour work week, 50 weeks of the year, the yearly hours of work is 2,000. At $80 per hour an attorney's annual gross income would be $160,000.00. At $50 per hour, $100,000 and at $30 per hour, $60,000.00. Any of these figures is far above the actual salaries of the attorneys in this case, even allowing for "overhead" expenses that a private attorney would have to pay out of his gross income.

§3006A. The rate is $30 per hour "in-court" and $20 per hour "out-of-court" with certain maximum limitations that are flexible.[2] The only qualification is that the appointed lawyers be admitted to the bar. The rates of pay are applicable to private attorneys, as well as "bar associations", "legal aid agencies," and "community defender organizations" that supply representation for indigents. Considering the actual salaries received by the attorneys in this case, the "public interest" nature of the work of CLS and the difficulty of the present litigation, I believe the rates provided by Congress under the Criminal Justice Act to be a fair guide, bearing in mind that the rate was last established in 1974, approximately two years ago.

4. The contingent nature of success.

Based solely on the initial admitted facts, the City, superficially at least, appeared to have been in clear violation of the express terms of the Act. Nevertheless, that portion of the private bar that was contacted was apparently uninterested in undertaking the case, despite the statutory provision for counsel fees in the event of success. This lack of interest may have been due to a variety of factors, but most likely was because of potential problems of litigation in that the prospects of such being "profitable" to a lawyer were less than attractive. Viewed prospectively, however, at the time litigation was instituted, I would have to conclude that the "contingent nature of success" was extremely favorable for obtaining injunctive relief. The prospects of obtaining a substantial monetary award, however, were far less favorable because of uncertain issues as to the measure of damages, which issues are presently on appeal.

2. Of passing interest, based on a 40 hour week, 50 weeks per year, Congress may be said to have established an "hourly rate of pay" for district judges of $21 per hour, and slightly higher rates for Circuit Court Judges and Justices of the Supreme Court.

5. The quality of the attorney's work.

The quality of the attorney's work was good, and the results to the individual plaintiff and the class plaintiffs, excellent. Nevertheless, the litigation did not involve difficult trial preparation, nor complex legal issues. Thus, the litigation was such that the quality of the attorney's work could be categorized as neither requiring nor being of any greater or lesser degree of skill and diligence than that of normally competent Philadelphia lawyers.

The petition seeks compensation as attorney's fees for the services of the law student. Even if it be conceded that the services rendered were of the type normally performed by attorneys, and, if they had been performed by attorneys, would be allowable as attorney's fees, I know of no basis for awarding a monetary sum as attorney's fees for services rendered by a non-lawyer. Whether services rendered by a law student might be claimed as "costs" is not before me. If a lawyer, who hires a law student, is entitled to claim attorney's fees for the law student's work, logically a claim could be made for the so-called "paralegals," and also the skilled legal secretary, who may draft pleadings or otherwise perform other legal-related functions. A private attorney, who is allowed attorney's fees, ordinarily receives a substantial rate of pay in order to cover the expenses of running a law office, including the employment of capable assistants as well as regular office overhead. The same principle, it seems to me, should apply in making an award in this case, which in reality will go to CLS.

Taking the foregoing factors into consideration, based upon the affidavits showing that Mr. Erba and Sheryl Dicker spent a total of 94 hours including both "in-court" and "out-of-court" time, an award of counsel fees of $2,820 will be made. This is based on an average hourly rate of $30.00 neither adding nor deducting

for the other factors considered as they appear to balance out equally on the plus and minus side.

AND NOW, this 5th day of October, 1976, the defendants are hereby ORDERED to pay to Community Legal Services, Inc., as counsel fees for plaintiff, the sum of $2,820.00.

BY THE COURT:

/S/

DONALD W. VAN ARTSDALEN

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2609, 76-2610 & 76-2611

LUIS A. RODRIGUEZ, On behalf of Himself and All other persons similarly situated

v.

LEWIS S. TAYLOR, Individually and in his official capacity as Director of Personnel of the City of Philadelphia
HILLEL S. LEVINSON, Individually and in his official capacity as Managing Director of the City of Philadelphia
FRANK L. RIZZO, Individually and in his official capacity as Mayor of the City of Philadelphia and THE CITY OF PHILADELPHIA

LUIS A. RODRIGUEZ, On behalf of Himself and All other persons similarly situated,
Appellant in No. 76-2609

LEWIS S. TAYLOR, Individually and in his official capacity as Director of Personnel of the City of Philadelphia
HILLEL S. LEVINSON, Individually and in his official capacity as Managing Director of the City of Philadelphia
FRANK L. RIZZO, Individually and in his official capacity as Mayor of the City of Philadelphia and
THE CITY OF PHILADELPHIA
Appellants in Nos. 76-2610 & 76-2611

(D.C. Civil No. 75-1738)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 9, 1977

Before ADAMS, VAN DUSEN and HUNTER, *Circuit Judges*

Andrew F. Erba, Esq. &
Sheryl Dicker, Esq.,
Community Legal Services, Inc.,
Philadelphia, Pa.,
Attorneys for Appellant in No. 76-2609 & Appellee in Nos. 76-2610 & 76-2611

Tyler E. Wren, Esq., Assistant City Solicitor;
James M. Penny, Jr., Esq., Assistant City Solicitor;
Sheldon L. Albert, Esq., City Solicitor;
Philadelphia, Pa.,
Attorneys for Appellants in Nos. 76-2610 & 76-2611 and Appellee in No. 76-2609

OPINION OF THE COURT

(Filed December 27, 1977)

VAN DUSEN, *Circuit Judge.*

This appeal raises diverse issues resulting from a district court award of back pay, liquidated damages and attorneys' fees to a plaintiff who successfully proved that the City of Philadelphia violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. IV 1974) (ADEA). We affirm in part and reverse in part the district court's award of monetary relief and attorneys' fees.

I.

Plaintiff, Luis Rodriguez, then age 46, applied on December 23, 1974, to the City of Philadelphia to take the competitive Civil Service examination for the position of Security Officer I. One month later, the City's Personnel Department informed Mr. Rodriguez that he could not sit for the examination because he was overage. Since 1966, the City of Philadelphia had adhered to a personnel policy requiring that applicants for the position of Security Officer I be less than 41 years of age in order to be eligible to take the requisite competitive examination.[1] Impelled by his rejection, and having exhausted federal and state administrative remedies, Mr. Rodriguez brought suit on behalf of himself and all other persons over the age of 41 against the City of Philadelphia (City) in the Eastern District of Pennsylvania. The gist of plaintiff's complaint alleged that the City's inflexible maximium age requirement for Security Officer I applicants violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. IV 1974).[2] The complaint sought class relief in the nature of a permanent injunction proscribing enforcement of the City's age limit and individual relief for Mr. Rodriguez in the form of an opportunity to take the competitive examination and an entitlement to recovery of pecuniary losses.[3]

The district court certified the class pursuant to Rule 23(b)(2) and, after a non-jury trial, concluded that the

1. The City's maximum age restriction applied only to prospective candidates for the position of Security Officer I. Employees hired before the age of 41 were not retired or reassigned on reaching age 41. At the time of Mr. Rodriguez's application, the City employed several officers older than 41.

2. The plaintiff's complaint also raised claims under 42 U.S.C. § 1983 and the Fourteenth Amendment, as well as a pendent state claim said to arise under the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, §§ 951 *et seq.* (Purdon) (1964). The district court rested liability solely on the basis of violation of pertinent provisions of the ADEA, obviating any consideration by this court of other possible sources of liability and concomitant relief.

3. Plaintiff's complaint requested an order placing him on the hiring list only if successful in the examination and "if hired to grant him back wages, retroactive benefits and seniority" (clause d, p. 12a). The complaint also added an open-ended request for whatever other relief the district court deemed fit and proper (clause f, p. 13a).

City's policy of barring persons over the age of 41 from taking the competitive examination for the job of Security Officer I violated § 4(a)(1) of the ADEA, 29 U.S.C. § 623 (a)(1), and was not a bona fide occupational qualification, *see* 29 U.S.C. § 623(f)(1). Accordingly, the district court ordered the requested class injunctive relief [4] but did not order any monetary relief to the class members other than the named plaintiff. Also, it granted the plaintiff an opportunity to take the examination he would have taken had he not been disqualified on the basis of his age. Were the plaintiff to score high enough to have been hired, but for his age, sometime between his original application and the time of trial, a period of one year and a half, he would have been entitled to the position of Security Officer I with full retroactive benefits. Whether or not Mr. Rodriguez proved to be successful on the exam, the district court awarded him, under § 7(b) of ADEA, 29 U.S.C. § 626(b), amounts owing as unpaid wages for the period between the date the first applicant was hired subsequent to the plaintiff's rejection and the date the final order was issued. The district court further ruled that because the City's violation was willful, the plaintiff was entitled to liquidated damages in the amount of the calculated unpaid minimum wages, *see* 29 U.S.C. § 626(b).[5] The district court ruled that the plaintiff, "having proved the violation, is not required to prove that 'but for' the violation he would have been hired in order to be entitled to an award of money both as an 'amount owing' to him and as liquidated damages" (119a). In a subsequent memorandum opinion of October 5, 1976, the district court awarded plaintiff's counsel, Community Legal Services, Inc., $2,820. in attorneys' fees.

4. The district judge supplemented his injunction barring enforcement of the age requirement by ordering certain corrective measures designed to publicize his order and to encourage middle-aged persons to sit for a new examination to be held to fill subsequent vacancies.

5. In describing his formula for calculating the back pay award, the district judge made no provision for offsetting any wages earned in the interim period between the rejection of plaintiff's application and trial.

The City has taken no appeal from the district court's conclusions of law that the personnel policy erecting age as a barrier to application for the position of Security Officer I willfully violated the ADEA and was not saved as a bona fide occupational qualification. Thus, for purposes of this appeal, the City stands as an undisputed willful violator of the ADEA, both with respect to the plaintiff, Luis Rodriguez, and the class of persons over age 41 which he represented. The City in this appeal challenges only certain aspects of the individual relief ordered by the district court.[6] The City contends that Mr. Rodriguez did not suffer pecuniary losses as a result of its discriminatory refusal to administer the employment examination and, therefore, he was not entitled to an unconditional award of unpaid wages or liquidated damages. The City also contends that the district court erred in not reducing the plaintiff's monetary award to account for wages he earned from other sources during the interim period for which back pay was calculated.

Furthermore, the City also appeals that portion of the district court's order entitling Mr. Rodriguez to be hired as a Security Officer I solely on the basis of his written examination performance. The City urges that the plaintiff's hiring should have been made contingent on his satisfaction of preexisting physical requirements for employment as a Security Officer I. Finally, the City maintains that the district court erred in awarding attorneys' fees under the ADEA to plaintiff's counsel, Community Legal Services. The plaintiff, while disputing all the grounds of appeal advanced by the City, has cross-appealed the calculation of attorneys' fees. The plaintiff contends that the district court employed incorrect standards in calculating

6. The City has not appealed the prospective non-monetary injunctive relief granted the class. In light of its acquiescence, we pretermit consideration of the City's assertion that under the ADEA class actions may only be maintained if class members affirmatively "opt in" in contrast to the Federal Rules of Civil Procedure Rule 23(c) "opt out" provision. *See* appellant's brief at p. 5, n.1.

the reasonable value of his attorneys' time devoted to this litigation.

At oral argument it was revealed that pursuant to the district court's order, Mr. Rodriguez was administered the competitive written examination for the job of Security Officer I, but that he failed to score high enough to have been hired during the time between rejection of his application and trial.[7] Mr. Rodriguez's examination failure moots the City's contention that he should not be hired without also passing a physical examination.[8] In view of Mr. Rodriguez's failure on the civil service exam, the district court's order will enable him to collect unpaid wages for a job for which he may have been unqualified on grounds other than his age. For the reasons stated below, we hold that the district court did not err in awarding both back pay and liquidated damages to Mr. Rodriguez. However, we conclude that the district court did err in not setting off wages earned during the same period for which back pay was calculated. Thus, we remand for a recalculation of the monetary relief accorded Mr. Rodriguez.[9] The district court similarly erred in the manner in which it calculated attorneys' fees which we hold Community Legal Services is entitled to under the mandatory attorneys' fees award provision of the ADEA.

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7. It is unclear whether Mr. Rodriguez failed absolutely in receiving a score so low as to preclude his employment even were there unfilled vacancies or that he only failed relatively in scoring below those persons actually hired during the interim period.

8. The district court's order would have hypothetically circumvented the City's alleged independent physical examination requirement only with respect to Mr. Rodriguez, who was the only person ordered hired solely on the basis of his written test performance. As regards all other future hiring, the district court did not preclude the City from establishing and enforcing bona fide job-related physical qualifications. Thus the City's argument that Mr. Rodriguez should have been required to submit to a physical examination has been mooted by the conjunction of the district court's order and Mr. Rodriguez's failure to pass the written exam.

9. The district court assessed liquidated damages in an amount equal to the underlying award of unpaid wages. Thus, insofar as the district court on remand may reduce the back pay award by setting off interim earnings, the equivalent liquidated damages penalty must be likewise reduced.

II.

The Age Discrimination in Employment Act of 1967 was enacted to ensure that employers base their hiring decisions on expectations of individuals' job performance rather than on unwarranted irrebuttable presumptions that all persons of a certain age less than 65 would be unable to satisfactorily perform a given job. Age became a proscribed basis for employment decisions in much the same manner as Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (1970 & Supp. IV 1974), had earlier prohibited employment discrimination on the basis of other immutable personal characteristics such as race, color, religion, sex or national origin. Age concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts. Congress recognized the likelihood of legitimate connections between age and ability and saved from its statutory strictures employment decisions "where age is a bona fide occupational qualification reasonably necessary to the formal operation of the particular business . . . ," § 4(f) of the ADEA, 29 U.S.C. § 623(f) (1970).

At trial, the plaintiff presented uncontroverted evidence that the City had established an absolute age limit of 41 for applicants for the position of Security Officer I. The plaintiff's evidence conclusively proved that his application for such a job had been rejected solely on the basis of his overage. Moreover, the City presented at trial no evidence indicating that Mr. Rodriguez was in any way unqualified for a job as a security guard or that there had not been vacancies which he might have filled. The City's evidence that its maximum age limit was a bona fide occupational qualification was found wanting by the district court and is not reiterated on appeal. Thus, the posture of plaintiff's suit as it stands before this court is that the City has committed a willful per se violation of the ADEA,

see Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.) *cert. denied*, 46 U.S.L.W. 3354 (Nov. 28, 1977). Notwithstanding its indisputable liability, the City now claims that the district court's grant of legal relief to Mr. Rodriguez was unauthorized by statute.

A.

Relief available to victims of unlawful age discrimination is governed by §7 of the ADEA, 29 U.S.C. §626 (1970), in conjunction with its incorporated enforcement provisions of the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. §626(b), *incorporating* 29 U.S.C. §§211(b), 216(b), 216(c), 217, 626(b), 626(c). The FLSA makes actionable employer violations of minimum wage and maximum hour laws and entitles aggrieved employees to recover "unpaid minimum wages" or "unpaid overtime compensation," as well as an equal amount of mandatory "liquidated damages." 29 U.S.C. §216(b) (1970). Violations of the ADEA do not typically involve an employer's failure to pay minimum or overtime wages. A discriminatory refusal to hire or promote workers on the basis of age is likely to result in monetary damages less precisely measurable. Section 7(b) of the ADEA defines available monetary relief only in terms of "amounts owing to a person as a result of a violation of this chapter." Such amounts "shall be enforced" as are unpaid minimum wages and unpaid overtime compensation under the FLSA enforcement provisions incorporated by reference. *See* 29 U.S.C. §626(b). Liquidated damages under the ADEA are available only in case of "willful violations" of the statute. In addition, §7(b) empowers the courts to grant such "legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

The "amounts owing" to a victim of age discrimination are not further defined by statute. Thus, the scope of pecuniary relief available under the ADEA must be ascertained from examination of the whole statutory scheme. Damage standards should effectuate the purposes of anti-discrimination statutes. *See generally Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977).

Monetary awards exacted from employers who practice unlawful discrimination serve two primary functions. First, the prospect of economic penalties more certainly deters illegal employment practice than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct. These prophylactic and compensatory purposes are the basis of most recent anti-employment discrimination legislation, including the ADEA and Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-21 (1975); H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967). Thus, the Supreme Court's mandate on the exercise of trial court's discretion in granting monetary relief in Title VII suits, as stated in *Albemarle, supra*, is equally compelling in the context of ADEA actions:

> "[G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

422 U.S. at 421.

The make whole standard of relief should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening

unlawful conduct of employers. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976) (Title VII standard). The difficulty arises in applying the concepts of a make whole restorative remedy and, but for causation, to facts developed in particular cases. Trial courts and the parties themselves invariably lack perfect hindsight to forecast what would have happened had there been no unlawful acts. Even in those cases where a retrospective fact finder can confidently determine where a plaintiff would have stood had there been no discrimination, the plaintiff is subjected, for often long periods of time prior to trial, to burdensome uncertainty.

For example, in the case at hand, Mr. Rodriguez did not and could not have known at the time of his application whether he would have obtained a job as Security Officer I had the City not unlawfully rejected his application. The City might have immediately discovered Mr. Rodriguez's true qualifications had they simply administered the examination prior to trial, thereby adducing direct evidence on Mr. Rodriguez's ability to perform the job of a security guard. Even by the time of trial, the parties had no evidence that Mr. Rodriguez was unqualified on grounds other than age. Given what the trial court did know on the basis of evidence introduced at trial, a dispositive issue on appeal is whether the trial court erred in awarding Mr. Rodriguez back pay unconditioned by his future performance on a competitive, written examination.

Resolution of this focal issue requires examination of the substantive and evidentiary rules governing retrospective compensatory relief. A substantive rule requiring recipients of back pay to have been able to satisfy all prior job qualifications except unlawful age standards is consistent with commonly understood meanings of make whole relief and but for causation. If an applicant would not have been hired because of a legitimate disqualification, then any lost wages are not properly attributable to unlawful age discrimination.[10] Consistent application of such a substantive rule in the context of diverse employment discrimination cases requires careful allocations of the evidentiary burdens of proof. Evidence of what might have happened will often be incomplete or in dispute.

In civil litigation generally, the plaintiff must present a quantum of evidence sufficient to withstand a defense motion for a directed verdict.[11] On those basic facts crucial to the plaintiff's case, he or she is said to bear the burden of production or of going forward.[12] The operation of presumptions in conjunction with burdens of production to implement substantive rules of law is especially prominent in the context of establishing liability for employment discrimination. To facilitate enforcement of Title VII and ADEA, courts have recognized certain presumptions and production burdens which have influenced the development of liability rules.[13] Recognition of evidentiary presumptions and burdens of proof will similarly clarify standards for the measurement of damages in ADEA actions.

In order to establish an employer's liability, Title VII plaintiffs, as an initial matter, need only present a prima facie case of employment discrimination. Plaintiffs satisfy their burden of production if they show that they are members of a protected class and that they were rejected for job vacancies for which they were qualified. Plaintiffs need not submit proof that a discriminatory motive underlay an employer's decisions. The burden of production then shifts to the defendant to adduce evidence of non-discriminatory motivation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-03 (1973); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399-400 (3d Cir. 1976); *Baxter v.*

10. See *Stewart v. General Motors Corp.*, 542 F.2d 445, 451-53 (7th Cir. 1976); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373-74 (8th Cir. 1974); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 443-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

11. C. McCormick, Handbook on the Law of Evidence, §§ 337, 338 (2d ed. 1972).

12. See authorities cited at 90 Harv. L. Rev. at 389 n.53.

13. See Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 388-99 (1976).

Savannah Sugar Refining Corp., 495 F.2d 437, 443-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974). Absent such rebuttal evidence, courts presume unlawful discriminatory purpose. Moreover, if an employer produces evidence of a non-discriminatory reason for an employment decision, he may bear the burden of persuasion on that ultimate issue.[14] Thus, under Title VII the courts have developed a set of shifting evidentiary burdens and presumptions that facilitates proof of employer's liability. *See Intnt'l B'hood of Teamsters v. United States*, 431 U.S. 324, 357-62 & nn.44-46 (1977).

Under the ADEA also plaintiffs are held to a production burden of presenting only a prima facie case of age discrimination. *See, e.g., Hodgson v. First Federal Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972). On presentation of a prima facie case, the burden of production shifts to the employer to justify differential treatment of older workers on a basis other than age.[15] Thus, liability under ADEA is enforced by means of evidentiary rules facilitating plaintiff's proof of an employer's discriminatory purpose.

The case at hand advances us beyond proven liability to the matter of evidentiary rules for the individualized relief phase of ADEA actions. Just as with the underlying liability determination, the twin objectives of monetary relief —deterring discrimination and making victims of discrim-

14. The majority of circuits have construed the *Green* case as shifting the burden of persuasion to the defendant employer once a plaintiff presents a prima facie case of employment discrimination. *See, e.g., Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974); *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 295-96 (9th Cir. 1974); *Vulcan Soc'y of the New York City Fire Dept. v. Civil Serv. Comm'n of New York*, 490 F.2d 387, 393 (2d Cir. 1973). *But see Long v. Ford Motor Co.*, 496 F.2d 500, 505-06 (6th Cir. 1974); *Gilliam v. City of Omaha*, 388 F. Supp. 842, 848 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975).

15. United States Courts of Appeals have differed as to whether the plaintiff or defendant bears the burden of persuasion if conflicting or equivocal evidence on discriminatory purpose is submitted to the jury. *Compare Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 822 (5th Cir. 1972) (burden shifts to employer), *with Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-13 (6th Cir. 1975). *See also* Note, *supra* note 13, at 390-99.

ination whole—are furthered by judicial recognition of evidentiary presumptions and burdens of proof designed to resolve uncertainties in favor of the aggrieved employee or applicant. Thus, we hold, in view of this record which *inter alia* awards back pay only to an individual plaintiff, not to a class of numerous applicants, that an employee who has prevailed in proving that an employer committed a per se violation of the ADEA shoulders the initial burden of production to present a prima facie case of entitlement to damages. This burden is discharged upon a showing that at the time of the unlawful discrimination (1) vacancies existed from which plaintiff was impermissibly excluded, and (2) that the plaintiff possessed physical and mental capabilities generally required of employees performing the type of work for which he applied. Upon such a showing, the burdens of production and persuasion shift to the employer to prove that the plaintiff would not have been hired even absent discriminatory age barriers. The defendant must, therefore, adduce evidence of either no job vacancies or plaintiff's lack of qualifications for the particular job.[16]

Mr. Rodriguez presented evidence at trial of existing vacancies for the job of Security Officer I that were filled by other applicants hired subsequent to his rejection. Mr. Rodriguez was also portrayed to the district court as a man generally qualified to perform security guard tasks. He had occupied similar positions both before and after his rejected application to the City. The trial court found Mr. Rodriguez sound of body and mind. Findings of Fact #9, district court opinion reprinted at 115a. On the trial record as a whole, we conclude that Mr. Rodriguez satisfied his

16. Our holding is consistent with a host of United States Courts of Appeals decisions placing the burden on employees to prove disqualification of an employee seeking back pay under Title VII. *See, e.g., Richerson v. Jones*, 551 F.2d 918, 924-25 (3d Cir. 1977); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976); *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 259-60 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974).

burden of production and proved a prima facie case of entitlement to damages. Moreover, there is no evidence on the record that the City rebutted plaintiff's prima facie case with proof of either Mr. Rodriguez's disqualifying mental attributes or his inability to pass any City examination. The City, with its silence in the face of plaintiff's prima facie case, simply did not meet its burden of rebuttal on the issue of whether Mr. Rodriguez would have been hired as a Security Officer but for the unlawful age discrimination. Thus, the district court did not err in its allocation of evidentiary burdens, nor did it err in concluding that plaintiff had proven his entitlement to a back pay award.[17]

The City might well have satisfied its burden of production and conclusively settled the ultimate issue of Mr. Rodriguez's qualifications had they only administered to him the written civil service exam prior to trial. Instead, the City failed to promptly administer the written exam precluding development of material evidence on this issue until after trial. The importance of requiring employers to adhere to their evidentiary burdens at trial is underscored by consideration of the consequences of delaying final determinations of Mr. Rodriguez's back pay award until the exam was taken.

During the period between the discriminatory employment decision and trial, Mr. Rodriguez faced considerable uncertainty as to whether he would eventually be adjudged entitled to back pay and/or future employment. Where a rejected job applicant, such as Mr. Rodriguez, was reasonably certain that an employer discriminated against him or her on the basis of age alone, that employee would have a reasonable expectation of subsequent vindication and re-

17. We read the district court's cryptic conclusion of law that Mr. Rodriguez did not have "to prove that 'but for' the violation he would have been hired in order to be entitled to an award of money . . . ," district court opinion, ¶ 9, reprinted at 119a, as consistent with our fuller explication of the relevant evidentiary burdens. The City's unresponsive evidence was insufficient to withstand a directed verdict against it on the subject of entitlement to damages had the matter been tried to a jury.

lief. The applicant would be deterred from seeking interim employment or a more permanent position lest it interfere with his opportunity to gain the preferred job from which he was unlawfully rejected. Significantly, making future employment conditioned on current qualifications does not place so harsh a burden of uncertainty on the discriminated against applicant. After Mr. Rodriguez failed to pass the court-ordered exam, he could freely seek other future employment without sacrifice of opportunities. But for the interim period prior to trial, Mr. Rodriguez cannot now make up his lost, past opportunity to seek alternative employment. Had the City administered and graded the exam shortly after his application, and had the results been the same, Mr. Rodriguez could have more determinedly pursued other employment.[17a]

We do not advocate that courts attempt to measure the emotional costs of the uncertainty faced by a rejected applicant such as Mr. Rodriguez. We have previously rejected claims that ADEA authorizes recompense for psychic distress attributable to unlawful age discrimination. *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977). However, compensatory relief as measured solely by lost wages should be awarded pursuant to rules and procedures which reflect and minimize the burdens of uncertainty. On the facts of this case, involving a damage award to an individual applicant, rather than to a class, requiring the defendant employer to come forward with evidence at trial of specific factors, such as low test scores, which would have disqualified an applicant irre-

17a. On the other side of the balance, administration of a standardized examination to a single candidate would not have been costly to the City nor would it have unduly complicated its hiring process. In situations of multiple applicants for a single or a few job openings, where some of the applicants are unlawfully rejected solely because of age, the consequences of not promptly administering qualification tests to those discriminated against may be substantially different. Success on an exam or in an interview may not provide a reasonable expectation of being selected from a large pool of other well qualified applicants for a limited number of vacancies. Moreover, administration of exams or conducting of interviews may be unduly burdensome to the employer. Assessment of the consequences in this latter situation of a class of numerous applicants should be evaluated on a concrete set of facts.

spective of discrimination best effectuates the restorative principle of make whole relief.[18]

Our recognition of a prima facie case for entitlement to back pay conforms to the Supreme Court's recent explications of evidentiary presumptions and burdens of proof governing individual claims for retroactvie seniority relief in Title VII actions. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court considered whether individual unnamed members of the class of black non-employee applicants for positions as over-the-road (OTR) truck drivers could be awarded retroactive seniority on proof that the employer engaged in a pattern of discriminatory hiring practices violative of Title VII.[19] The district court had denied seniority benefits claims to the class because "such claims 'presuppose a vacancy, qualification and performance by every member. There is no evidence on which to base these multiple conclusions . . . .'" *Id.* at 772. The Court ruled that such concern should not bar relief to the entire class but would be

18. Further factors militating in favor of a prima facie entitlement to back pay concerns the nature of proof of an applicant's qualifications. In the instant case, the City wished to rely on a civil service exam from which an applicant's performance could be objectively marked and measured against competitors. Other employers might administer more subjectively graded exams. The more subjective an evaluation is, the greater is the need for an employer to come forward with it at trial. Such evaluations may provoke challenges by the plaintiff, which should be resolved at trial rather than at a second proceeding. Moreover, challenges to the legitimacy of employment tests are also facilitated by evidentiary rules which require all relevant evidence to be developed at an initial trial, rather than in a subsequent proceeding, which would merely protract the applicant's uncertainty. Finally, in other cases the interval of time between application and trial may be so long as to cast doubts on the equivalence of testing periods. Where time may dissipate an individual's chances of scoring highly on an exam, evidentiary rules may beneficially encourage employers to administer exams promptly despite age barriers.

19. The district court had permanently enjoined the employer and certain labor unions from perpetuating discriminatory practices found to exist. The district court had refused to award any individual legal relief to unnamed members of the class. The court of appeals reversed in part, holding that back pay could be awarded to members of the separate classes of non-employee applicants and employee applicants denied transfer to OTR jobs. *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974). The court of appeals also authorized the award of retroactive seniority to members of the class of employees who sought transfer but not to individual non-employee applicants for OTR positions. The Supreme Court reviewed only the claim by unnamed members of the class of non-employees black applicants for retroactive seniority relief.

material to individual claims for relief. After noting that the make-whole objective of Title VII should govern the trial court's discretion in awarding legal relief, *id.* at 762-66, the Court allocated the requisite burdens of production in cases where individual class members seek retroactive seniority:

> "[P]etitioners [non-employee applicants] here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents [employer] and, therefore, the burden will be upon respondents [employer] to prove that individuals who reapply were not in fact victims of previous hiring discrimination."

Id. at 772 (citations omitted).

Finally, the Court emphasized that the employer, to defeat individual claims for relief, would bear the burden of proof on the lack of vacancies and an "individual's lack of qualification . . . under nondiscriminatory standards *actually applied* to individuals who were in fact hired." *Id.* at 773 n.32 (emphasis in original).[20]

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357-62 (1977), the Supreme Court reiterated that the evidentiary rules prescribed in *Franks* created a rebuttable presumption that individual members of a class subjected to a pattern of discriminatory hiring practices are entitled to relief. In *Teamsters*, the Court justified the presumption in favor of individual relief on the ground that the employer stood as a "proven wrongdoer" and controlled access to proof of matters such as an applicant's qualifications. *See id.* at 359 n.45. Thus, the thrust of the Supreme Court's Title VII cases is to shift

20. The Court did not distinguish between shifting the burdens of production or persuasion. At the very least, the Court meant to shift the former. For purposes of the instant case, we need not determine which litigant would bear the burden of persuasion on an individual's qualifications in a case where both parties present evidence on the matter. In this case, the City abnegated its burden of coming forward at trial with any evidence of plaintiff's disqualification.

the burden of production to defendants-employers on the issue of what would have happened to job applicants had there been no discriminatory employment practices. Our holding, applicable in ADEA actions, creates a similar rebuttable presumption by shifting to employers the burden of production of evidence of an individual's lack of qualifications in cases where victims of proven discrimination seek retroactive relief.[21]

B.

Having determined that Mr. Rodriguez is entitled to a back pay award, it is necessary to consider a further objection raised by the City to the manner in which the award was calculated. The City contends that the district court erred in not setting off against unpaid wages amounts Mr. Rodriguez earned from other employment. The district court's findings of fact and trial testimony indicate that Mr. Rodriguez worked part-time for his local parish and irregularly as a self-employed private security guard during the interim period for which back pay was calculated (¶ 9, 115a; 54a-56a). Yet the district court did not subtract from its calculation of back pay the income Mr. Rodriguez earned from his part-time jobs.[22]

Reiterating the principle of make-whole relief, a victim of employment discrimination is entitled to be restored to the economic position he would have occupied but for the unlawful discrimination. The only provision in ADEA authorizing more favorable pecuniary relief stipulates liquidated damages be calculated on the basis of the underlying compensatory award in the event of a willful viola-

21. We need not decide here the proper allocation of evidentiary burdens where similarly situated plaintiffs seek forward-looking equitable relief. Orders for reinstatement or hiring are of on-going consequence to both employee and employer and involve more than making a victim of discrimination whole for past injuries. Back pay, by contrast, squares accounts of what may be a closed relationship. The Supreme Court in *Franks* seems to have recognized such a distinction between prospective affirmative equitable relief and retrospective legal relief. *See* 424 U.S. at 772 n.31.

22. The district court made no finding as to the amount Mr. Rodriguez earned during the interim period. Nor did the court express a conclusion of law that a set off to the back pay award was inapposite.

tion. By not setting off Mr. Rodriguez's earnings during the interim period, the district court's order affords him income from two jobs that he could not have simultaneously performed. Thus, the plaintiff was placed in a better economic position than he would have achieved had he not been discriminated against in the first place.

Plaintiff contends that Congress did not contemplate set-offs to ADEA back pay awards. He points to Title VII's back pay provision, which expressly requires that interim earnings be set off against back pay otherwise owing. 42 U.S.C. § 2000e-5(g) (1970). By contrast, the ADEA enforcement provisions do not explicitly mandate such a set-off. It is true that we have stated that the ADEA and Title VII are not to be read as providing wholly consistent enforcement provisions. *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 840 n.10 (1977). However, the absence of express set-off language in the ADEA enforcement provisions does not compel the inference that Congress intended to preclude set-offs. The make-whole relief objective is common to both Title VII and ADEA and will be effectuated only if back pay awards are reduced to reflect alternate source earnings.[23]

23. Courts which have considered the applicability of set offs to ADEA awards have uniformly endorsed a set off of at least income earned from interim period employment. *See EEOC v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317-18 (6th Cir. 1975); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373-74 (8th Cir. 1974); *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579 (D. D.C. 1974). This circuit has previously approved a district court Title VII award formula which factored in a set off for amounts actually earned. *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 401 (3d Cir. 1976).

Plaintiff relies on a recent Fifth Circuit decision, *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977), that affirmed a district court ADEA award that did not deduct from back wages unemployment compensation benefits received during the interim period. The appeals court reasoned that unemployment compensation was a collateral benefit akin to collateral losses not compensated for in measuring back pay owing to a plaintiff. To not set off such collateral benefits would not, the *Marshall* court concluded, make the employee more than whole. Without passing judgment on the wisdom of the *Marshall* decision, we note that alternate employment income is surely a direct benefit compared to unemployment compensation. Thus, on the Fifth Circuit's own logic, an employee is made more than whole if he obtains current back pay for two jobs which he could not have simultaneously performed.

We hold that rejected job applicants who prevail under ADEA are entitled to back pay in the amounts they would have earned but for the discrimination, less wages actually earned from other employment that could not have been simultaneously performed with the jobs to which they aspired. Defendant-employers must assume the burdens of production and persuasion on the issue of set-offs. Thus, on remand, the district court must consider whether the City proved by a preponderance of the evidence that Mr. Rodriguez's part-time and irregular employment could not have been undertaken had the City hired him as a Security Officer I.

The City also takes exception to the district court's award of liquidated damages on the ground that if no compensatory relief is owing, as they contend, liquidated damages may not be assessed. Having affirmed the granting of compensatory relief, subject only to the modification as to amount, we leave the award of liquidated damages to the trial judge's discretion, *see, e.g., Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976). In light of our holding relating to the mitigation of compensatory damages under the ADEA, the district court should reconsider on remand its award of liquidated damages on the record as it then exists in this case.

III.

Both parties appeal from the district court's order of October 5, 1976, awarding attorneys' fees to plaintiff's counsel, Community Legal Services, Inc. (CLS). The City contends that CLS, a non-profit, federally-funded, legal services organization is barred by federal law and its own charter from receiving court-awarded attorneys' fees. Plaintiff appeals the calculation of the amount of the award. Specifically, plaintiff contends that the district court's use of a $30.00 per hour rate of compensation based on fee rates in the Criminal Justice Act, 18 U.S.C. § 3006A

(d)(1) (1974), constitutes reversible error.[24] We turn to the threshold issue of CLS's eligibility to receive attorneys' fee awards for successfully prosecuting a suit brought under ADEA.

A.

Community Legal Services, Inc. was chartered under the provisions of Pennsylvania's Non-Profit Corporation Law. According to its charter, CLS may provide legal services to persons financially unable to secure counsel except in matters of a contingent nature or which may yield "a recovery sufficient to interest a private attorney in accepting such a case." Art. IX, Articles of Incorporation of Community Legal Services, Inc., June 23, 1966, *reprinted in* appellants' reply brief at p. 29. CLS receives funds from the federal Legal Services Corporation and, therefore, operates subject to the restriction of the Legal Services Corporation Act of 1974, which prohibits recipient legal services organizations from using federal funds in fee generating cases, 42 U.S.C. § 2996f(b)(1) (1974).

The ADEA enforcement provision, 29 U.S.C. § 626(b), incorporates that part of the Fair Labor Standards Act which provides: "The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant . . . ." 29 U.S.C. § 216(b) (1970). Given this mandatory language without apparent exception, the district court had to determine whether CLS was implicitly barred by either the Legal Services Corporation Act or other federal law from receiving attorneys' fees awards. In its memorandum opinion the district court found no reason to spare the City an assessment of fees to reimburse CLS (126a). We agree with the district court's conclusion and hold that publicly funded legal services organizations, such as CLS, are not absolutely barred from receiving mandatory ADEA

24. Plaintiff does not challenge the hourly rate allowed Ms. Dicker, but requests modification only in the hourly rate applied to the time expended by Mr. Erba, the senior and lead counsel.

attorneys' fee awards by virtue of the legal limitations on their authority to handle fee generating or contingent fee cases.

The attorneys' fee provisions in the Fair Labor Standards Act have been construed to mandate awards to successful plaintiffs. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 261 n.34 (1975) (dictum); *Wright v. Carrigg,* 275 F.2d 448, 449 (4th Cir. 1960); *Whitington v. Roberts,* 360 F. Supp. 335, 338 (N.D. Miss. 1973). This court has previously stated that "[c]onsequently, attorneys' fees are to be awarded in age discrimination suits in which the employee prevails." *Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834, 842 (1977). In spite of this unqualified legislative and judicial authority for an award of fees to *all* successful plaintiffs, the City urges this court to judicially except those plaintiffs represented by organizations such as CLS which are publicly funded and furnish legal services free of charge to needy citizens.

As a general matter, awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards. *Torres v. Sachs,* 538 F.2d 10, 13 (2d Cir. 1976); *Brandenburger v. Thompson,* 494 F.2d 885, 889 (9th Cir. 1974); *Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 538-39 (5th Cir. 1970). Of course, since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel. *Hairston v. R & R Apartments,* 510 F.2d 1090, 1093 (7th Cir. 1975).

The statutory policies underlying the award of fees justify such shifting without regard to whether the individual plaintiff initially assumed the financial burdens of representation. The traditional, and generally applicable, "American Rule" denies successful litigants the possibility of recovering fees from their opponents. Beyond the applicability of several narrow judicially recognized exceptions to the American Rule, the Supreme Court insists that Congress must affirmatively authorize fee awards. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Congress, in fact, has often taken up the cudgel and authorized or mandated fee awards in suits brought under diverse statutes. *See id.* at 260 n.33. Typically, congressionally approved awards are designed to encourage private enforcement of individual rights and to deter socially harmful conduct. For example, Congress, in passing the Civil Rights Act of 1964, authorized fee awards for "private attorneys general" who might otherwise be deterred from bringing suit because of the burdensome costs of litigation. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 401-02 (1968) (per curiam). More recently, Congress responded to the Supreme Court's decision in *Alyeska Pipeline* by closing "gaps" left in other civil rights laws and authorized the award of attorneys' fees in actions brought under several provisions, including 42 U.S.C. §§ 1981, 1982, 1983 and 1985. Civil Rights Attorney's Fees Awards Act of 1976, *amending* 42 U.S.C. § 1988 (1976). *See* Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. The award of fees to legal aid offices and other groups furnishing *pro bono publico* representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel. Legal services organizations often must ration their limited financial and manpower resources. Allowing them to recover fees enhances their capabilities to assist in the enforcement of congressionally favored individual rights. *See Hairston v. R & R Apartments,* 510 F.2d 1090, 1092-93 (7th Cir. 1975); *Palmer v. Columbia Gas of Ohio, Inc.,* 375 F. Supp. 634, 636 (N.D. Ohio 1974); *Jones v. Seldon's Furniture Warehouse, Inc.,* 357 F. Supp. 886, 887-88 (E.D. Va. 1973); Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411, 413-14 (1973). Moreover, assessing fees against defendants in all circumstances may deter

wrongdoing in the first place. See *Jones v. Seldon's Furniture Warehouse, Inc., supra.*

The City concedes that the purpose in funding legal services organizations and in authorizing awards of fees are in part identical—removing financial barriers to access to the courts. The City contends, however, that the separate congressional initiatives are mutually exclusive solutions to the problem of enhancing access to the courts. There are no persuasive logical or policy reasons why awards of fees to legal services organizations in particular cases cannot complement the base funding of such groups. Nor have we been referred to any expressions of congressional intent to exclude legal aid offices from receipt of attorneys' fees awards. The City instead presses a construction of the Legal Services Corporation Act's prohibition of the use of federal funds for fee generating cases as covering all suits brought under statutes authorizing awards of fees to successful plaintiffs.[25]

The Legal Services Corporation Act bars recipient organizations from using federal funds "to provide legal assistance with respect to any fee-generating case (except in accordance with guidelines promulgated by the Corporation) . . . ." 42 U.S.C. § 2996f(b)(1) (1974). The Legal Services Corporation has adopted implementing regulations which do not flatly prohibit legal services organizations from maintaining fee-generating cases in all situations. 45 C.F.R. §§ 1609 *et seq.* (1976). The regulations qualify the statutory bar by permitting legal services organizations to provide counsel in fee-generating cases as a

25. It should be noted that the City's argument has far broader ramifications than that legal services organizations may not receive fee awards. The statutory provision on which the City relies forbids the use of federal funds in maintaining the suits from the outset. Thus, were we to rule that 42 U.S.C. § 2996f(b)(1) absolutely bars awards of fees to legal aid offices, we would per force restrict legal services from participation in many matters, such as civil rights suits, in which Congress must have contemplated an active role for legal services organizations. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 262-63 n.36 (1975) (remarks during congressional debates on passage of the Legal Services Corporation Act of 1974 indicate that legal services organizations would be able to accept fee awards where pursuing the role of private attorneys general).

matter of last resort if no other adequate private representation is available. *Id.* § 1609.3. The thrust of the enabling regulations is that legal services organizations should not compete with private practitioners but that if no private attorneys were willing to accept a particular fee-generating case, then legal aid offices may furnish counsel. With this policy rationale as a backdrop, the Corporations' guidelines expressly permit recipient organizations to accept court-awarded fees if there are certain assurances that private counsel is unavailable.[26] *Id.* §§ 1609.4, 1609.5.

The district court found nothing on the record to suggest that CLS failed to follow its routine procedures to determine whether there might have been private counsel available to accept Mr. Rodriguez's suit (126a). Nor is there any suggestion on the record that CLS's internal procedures are deficient in identifying those cases where private attorneys might be available to accept a case on the contingency of a fee award. The City contends that CLS should bear the burden of introducing evidence that this particular case was indeed one in which private representation was unavailable and that, absent such affirmative evidence, a violation of federal regulations must be presumed. If a legal services organization's routine procedures comply with Legal Services Corporation regulations on fee-generating cases, 45 C.F.R. § 1609.4, as CLS's apparently do, we see no reason to establish a presumption that the organization circumvents its own procedures. Thus, as to this particular request for attorney's fees we perceive no basis for disturbing the district court's finding that "[p]rivate attorneys apparently lacked interest." (126a) Given such a finding that CLS's acceptance of

26. The regulations define fee-generating cases as those which "reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party." 45 C.F.R. § 1609.3. It is unnecessary to determine here whether all suits brought under statutes which authorize discretionary fee awards, as distinct from mandatory awards under ADEA, bear a reasonable expectation of a fee award. Moreover, the probability of success on the merits may be so low in some cases, although not frivolously low, as to dispel any reasonable expectation of even a mandatory award.

Mr. Rodriguez's suit in no way competed with the private bar, CLS may be awarded attorney's fees in accord with the enabling regulation, 45 C.F.R. § 1609.5.[27]

B.

We have consistently deferred to the informed discretion of the district court in calculating an award of attorneys' fees. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976) (Lindy II); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 295 (3d Cir. 1974) (Merola I); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d Cir. 1973) (Lindy I). The exercise of such discretion must, however, conform to proper standards and procedures. The failure of a trial court to adhere to generally applicable rules and criteria may constitute a "misuse" of discretion unentitled to the appellate court deference generally accorded factually oriented calculations by a trial judge. *Lindy II, supra* at 116; *Merola I, supra* at 295. On this appeal we are confronted with plaintiff's argument that the district court misused its discretion by relying on impermissible criteria in formulating its award of fees.

The leading case governing calculation of attorneys' fees awards in this circuit is *Lindy I*. There Chief Judge Seitz prescribed generally applicable standards to guide district courts in measuring reasonable attorneys' fees. The focal point of the *Lindy I* standards is the purpose of fee awards—compensation of attorneys for the reasonable value of services benefiting the plaintiffs. *Lindy I* at 167.

27. In its supplemental reply brief, the City contends that Article IX of CLS's charter is more restrictive than federal regulations and absolutely bars acceptance of any case that affords a reasonable prospect of a fee award. Article IX does not expressly equate attorneys' fee awards with personal injury cases, which are expressly proscribed by charter. Article IX seems designed to forestall CLS's incursion into the domain of the private bar, thereby complementing the federal regulations with the same purpose. Satisfaction of the latter regulations should imply satisfaction of the similarly conceived, but more vaguely worded, charter restrictions.

The "lodestar" for an objective calculation of the reasonable value of attorneys' services involves determining the number of compensable hours and multiplying those hours by a reasonable hourly rate. *Id.* at 167-68. The resulting product constitutes an expected market value of attorneys' services. *Merola I, supra* at 298. The objective market value figure is then adjusted to reflect more subjective factors indicative of the value of the delivered performance such as the quality of work, the contingency of success and the benefit conferred. *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 173 (3d Cir. 1975) (Merola II); *Merola I, supra* at 298; *Lindy I, supra* at 168-69.

The instant appeal concerns the criteria employed by the district court in fixing a reasonable hourly rate for legal services organization attorneys. In *Lindy I* we noted that "[t]he value of an attorney's time *generally* is reflected in his normal billing rate." *Lindy I, supra* at 167 (emphasis added). An obvious difficulty arises when the attorneys entitled to fees do not have a normal billing rate and, instead, are salaried employees of a publicly-funded legal services organization. Lacking a precise referent for deriving a reasonable hourly rate for CLS employees, the district court seized upon three factors—the attorneys' experience, their annual salaries, and compensation for lawyers appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (1970). We are called upon to determine whether reliance on any of these factors in estimating a reasonable hourly rate may constitute a misuse of discretion in calculating an amount of a fees award.[28]

The absolute levels of billing rates for attorneys in a private firm depend in large measure on the financial stakes clients have in particular matters. While partnership

28. After settling on an hourly rate for the CLS attorneys' services, the district court considered the other *Lindy I* factors, which focus on the delivered performance value of their services—contingent nature of success (130a-31a) and quality of work (131a-32a). *Merola I, supra* at 298. The district court concluded that these other factors balanced out necessitating no adjustment of his lodestar calculation of the value of the attorneys' time expended in litigation. Neither party has taken an appeal contesting the district court's findings as to the balancing out of the various plus factors.

shares and associates' salaries may vary on the basis of relative experience and responsibility, the structure of a firm's billing rates is generally a function of the type of work performed and the affluence of its clients. Whether the practitioners be top flight antitrust or securities litigators or contingent fee tort lawyers, billing rates reflect their clients' monetary stakes, whether in the form of potential cash awards or liabilities. Whenever private counsel petition for reasonable fee awards, they will point to their market billing rates, which are determined in large part by the financial stakes in contested matters.[29]

Legal services attorneys and other public interest lawyers do not have normal billing rates because they have no "market" for their skills. These attorneys typically do not bill their clients at all. As a result, the reasonable value of these attorneys' time cannot be simply measured by observing their market rates. Moreover, legal services attorneys' work cannot be valued by comparing the pecuniary benefits conferred on their clients to the larger financial stakes in matters handled by the private bar.

As we have observed above, CLS cannot generally represent clients, however impecunious, if substantial monetary benefits might be won. Thus, legal services organizations may win only modest cash awards or non-monetized equitable relief for their clients. Despite the often insignificant potential monetary benefits in individual cases, legal services organizations render valuable services to their clients and their communities. Legal aid organizations often are the sole representatives of the economically, socially and culturally deprived in their disputes with landlords, government welfare agencies, employers and creditors. The cumulative value to society, and hence the derivative value of individual attorney's time, from legal services representation of the needy is substantial, albeit

29. Admittedly, when private firms handle *pro bono publico* litigation, they often request reduced hourly rates of compensation so as not to make a profit. *See, e.g. Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700, 707 (E.D. Pa. 1977). Nevertheless, the referent for determining a break even hourly rate remains their prevailing market rates for their regular clients.

not easily monetized. The only fair conclusion that can be reached is that, with the present structure for the delivery of legal services, relative compensation of private firm attorneys and legal aid lawyers does not entirely reflect differences in the reasonable value of their respective professional time. Courts, in awarding attorneys' fees, are not empowered to rectify this general disparity. However, they may properly take account of these market disparities in fixing reasonable hourly rates for particular awards. We believe that excessive consideration to either legal aid salaries or to Criminal Justice Act (CJA) fee scales deflects calculation of a reasonable hourly rate of compensation for legal services attorneys.

Legal services salaries are generally considerably lower than salaries paid associates in private firms who have comparable experience and credentials. This salary differential need bear no relation to the quality of representation, in general or in a particular case, or to the benefits received by clients. Compensation disparities usually reflect the relative poverty of legal services funding. While a CLS attorney's salary need not be ignored by the trial court, neither should it serve as the polestar for fixing a reasonable hourly rate of compensation. Relative salaries within the legal services unit reflect relative expertise and responsibility and, therefore, provide an objective guide to setting *relative* hourly rates.[30] Reference to absolute salary levels is about as reasonable as deriving the reasonable value of a federal judge's time from his or her salary.[31] Thus, we hold that the district court misused its discretion by emphasizing the factor of absolute salaries paid by CLS in deriving an hourly rate of compensation. To the extent salary levels are relevant, the appropriate referent would be comparable salaries earned by private

30. In fact, the district court approved a $30.00 per hour rate for both CLS attorneys, even though the senior of the two earned $4,000. more in salary, a differential of over 30%.

31. The problems with figures generated by deduction of judges' hourly rates are amply illustrated in the district court's opinion (130a, n.2).

attorneys with similar experience and expertise in equivalent litigation.

The district court, in addition to factoring in CLS salaries, used as a benchmark congressionally specified fees for court-appointed attorneys who represent indigent criminal defendants. Under the Criminal Justice Act, court-appointed counsel, whether they be from the private bar or a public defender organization, are entitled to the limited amounts of $30.00 per hour for in-court representation and $20.00 per hour for out-of-court preparation, subject as well to maximum limits on the total fee. 18 U.S.C. § 3006A(d) (1970). Compensation is awarded regardless of the outcome of the criminal proceeding. At issue here is whether a district court misuses its discretion by applying CJA rates as a primary basis for calculating a reasonable hourly rate for legal services representation in age discrimination suits.

The Criminal Justice Act fee rates apply by force of statute only to court-appointed counsel for indigent criminal defendants. Congress has not explicitly incorporated these fee rates in the ADEA. Instead, Congress incorporated the more flexible standard from the Fair Labor Standards Act, which provides for a judicially calculated award of "a reasonable attorney's fee." 29 U.S.C. § 216(b) (1974). The district court judge in this case deemed the non-incorporated CJA fee rates a suitable guide for determining a reasonable hourly rate. We believe that CJA fees rates are a product of several factors unique to the criminal defense context which militate against their application in employment discrimination suits.

The Federal Government is obligated, as a matter of constitutional law, to furnish counsel for indigent criminal defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). No such obligation extends to civil litigants. Thus, compensation must be accorded court-appointed counsel under the CJA regardless of the outcome of the proceedings. In ADEA suits, only a successful plaintiff may recover fees.

In the criminal context, the Federal Government must assume the entire burden of paying court-awarded fees, even where the prosecution prevails in obtaining convictions. In employment discrimination suits, defendants who pay fee awards must have been found liable for unlawful practices. Significantly, the ADEA applies to private and public employers.[32] Moreover, members of the bar may have a greater duty to their profession to accept criminal defense representation than civil plaintiffs at less than customary compensation.[33] Thus, the modest fee allowances in the CJA reflect in large measure these unique features of the criminal defense system.

In civil rights litigation, closely analogous to ADEA, Congress has directed judges, in calculating attorneys' fee awards, to consider factors other than adoption of CJA fee schedules. The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act), amending 42 U.S.C. § 1988, applicable to suits brought under 42 U.S.C. § 1983 and companion civil rights provisions, authorizes discretionary awards to prevailing parties of "reasonable" attorneys' fees. The legislative history of the Fees Act makes clear that Congress intended the referent for reasonable fees to be awards in comparable litigation. The Senate Report accompanying the bill enacted into law expresses the congressional directive as follows:

> "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litiga-

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32. The fact that the City of Philadelphia's tax revenues must pay the fees award does not warrant special standards for public and private employers. The reasonable value of an attorney's time does not depend on who his or her adversary is. *See Torres v. Sachs*, 538 F.2d 10, 12-13 & n.2 (2d Cir. 1976).

33. The legislative committee reports accompanying the CJA reveal that Congress intended the fee awards to "offer some but not full compensation for the appointed attorney." House Report No. 91-1546, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 3982, 3984 (adopting identical language of Senate Report No. 91-790).

tion, such as antitrust cases and not be reduced because the rights involved may be non-pecuniary in nature."

Senate Report No. 94-1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. Cong. & Ad. News 5913.

The First Circuit Court of Appeals has recently considered the appropriateness of reliance on CJA fee rates in calculating awards granted under the newly enacted Fees Act. After considering the legislative history cited above, the court concluded that, "[m]echanical application of the Criminal Justice act fees scale obviously does not meet these criteria . . . ." *King v. Greenblatt*, No. 74-1425 (1st Cir., Aug. 15, 1977), slip op. at 4, *overruling Souza v. Travisano*, 512 F.2d 1137 (1st Cir.), *vacated*, 423 U.S. 809 (1975). *See also Torres v. Sachs*, 538 F.2d 10, 12-13 & n.2 (2d Cir. 1976) (fees in actions under the Voting Rights Act of 1964 are to be measured by same standards as in other complex litigation); *Palmer v. Rogers*, 10 E.P.D. ¶ 10,499 at p. 6131 (D. D.C. 1975) (rejecting application of CJA fee scales in the calculation of awards under Title VII). We agree with the First Circuit and rule that in the analogous context of ADEA suits, district court judges should look to cases of similar complexity, in particular other employment discrimination and related civil rights suits, to determine reasonable hourly rates for counsel who do not have normal private practice billing rates.

We do not hold that awards figured on the basis of a $30.00 per hour rate of compensation are unreasonable or that they are out of line with rates used in calculating awards in comparably complex litigation. Nor do we pass judgment on the reasonableness of the requested $50.00 per hour rate for the senior CLS attorney. We hold only that the district court judge misused his discretion in fixing hourly rates of compensation on the basis of CLS's absolute salary levels and the CJA fee scale. On remand, the district court should undertake appropriate fact finding to apply the criteria discussed in this opinion for determining a reasonable hourly rate of compensation for

CLS attorneys.[34] *See Richerson v. Jones*, 551 F.2d 918, 928-29 (3d Cir. 1977); *Merola II*, *supra* at 168-69.

IV.

For the foregoing reasons, paragraph 5 of the district court's order of September 2, 1976, and the district court's order of October 5, 1976, will be vacated and the case will be remanded for further action in accordance with this opinion, including determination of these issues: the recalculation of plaintiff's monetary award to account for necessary set-offs, and the recalculation of the attorneys' fee award to reflect the reasonable value of the CLS attorney's time devoted to this litigation.

34. We note that counsel for the plaintiff have appended to their brief a deposition attesting to the number of hours devoted to this appeal. Claims for an award for these hours should be addressed to the district court on remand.

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